

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

09/26/2001

CLERK OF THE COURT
FORM L000

HONORABLE MICHAEL D. JONES

M. Cearfoss
Deputy

LC 2001-000106

FILED: _____

STATE OF ARIZONA

CARRIE M COLE

v.

TROY REED MUSSELMANN

CAMERON A MORGAN

REMAND DESK CR-CCC
SCOTTSDALE CITY COURT

RULING
REVERSE/REMAND

SCOTTSDALE CITY COURT

Cit. No. 1454859

Charge: 1. DV-ASSAULT
2. DV-DISORDERLY CONDUCT

DOB: 12-11-1968

DOC: 06-18-2000

This Court has jurisdiction of this appeal pursuant to the Arizona Constitution, Article VI, Section 16, and A.R.S. Section 12-124(A).

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This matter has been under advisement since oral argument on September 10, 2001, and this decision is rendered within 30 days as required by Rule 9.8, Superior Court Local Rules of Practice. The Court has considered the argument of counsel, the record of the proceedings from the Scottsdale City Court and the memoranda submitted.

Appellant, Troy Reed Musselmann, was charged with Assault, a class 1 misdemeanor, in violation of A.R.S. Section 13-1203(A)(1); and Disorderly Conduct, a class 1 misdemeanor, in violation of A.R.S. Section 13-2904(A)(1). Appellant's bench trial commenced January 2, 2001, and concluded January 17, 2001. Appellant was found not guilty of Disorderly Conduct, but guilty of the Assault charge. Appellant was sentenced on February 11, 2001, and was placed on probation for a period of 24 months. Appellant was ordered to pay a fine of \$195.00, \$100.00 in probation costs, \$549.01 in restitution, and ordered to complete a domestic, non-violence program. A timely Notice of Appeal was filed in this case.

The victim in this case was Kelly Musselmann, Appellant's estranged wife. Appellant and the victim were separated but not divorced. The issue raised by Appellant in his memorandum and in oral argument is whether the trial court erred in its finding that the justification statute (A.R.S. Section 13-407) did not apply under the facts of this case.

This Court determines, as a matter of law, that the trial court erred by failing to apply the affirmative defense found in A.R.S. 13-407 (the "justification statute").

It is important to understand that the facts of this case established that the parties were separated and in the process of obtaining a divorce.¹ Appellant and Kelly Musselmann have a three-year-old daughter, Bailey.² Appellant and Kelly Musselmann admitted their mutual misunderstanding of who would have Bailey

¹ Reporter's Transcript of January 2, 2001, at pages 15-16.

² Id. at 7.

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for Father's Day, 2000.³ Kelly Musselmann testified that she attempted to remove Bailey from her husband's Suburban when Bailey refused to come to her.⁴ Appellant grabbed her around the waist and attempted to remove her from the car.⁵ As Appellant attempted to pull Kelly Musselmann from the Suburban, her arm became wedged between the seat and the side of the vehicle.⁶ Kelly Musselmann injured the muscle and the tissue in her elbow.⁷

Appellant's defense was simple: He testified that he was attempting to prevent Kelly Musselmann's criminal trespass upon his property. Appellant testified that he purchased the residence where the incident took place in March of 1995.⁸ Appellant and Kelly Musselmann were married the following year in 1996.⁹ Appellant also testified that Kelly Musselman was not residing in that residence at the time of the alleged assault. She had moved out in July of 1999 and had not resided in the residence since July of 1999.¹⁰ Appellant testified that he repeatedly told Kelly Musselmann to get out of the truck, but she ignored him and struggled against him.¹¹ After Kelly Musselmann hurt her arm, Appellant called 9-1-1 and reported the incident to the police.

The State has incorrectly contended that Appellant's residence located at 6732 E. Hubbell, Scottsdale, Arizona, was the marital residence and was community property because of the presumption that property acquired during the marriage is community property. This property was not acquired during the marriage. At best, the community may have a lien against the property for community funds which were used to pay the mortgage or improve the property. A lien does not change the character

³ Id. at 8-9.

⁴ Id. at 26.

⁵ Id. at 9.

⁶ Id.

⁷ Id. at 11.

⁸ Reporter's Transcript of January 17, 2001, at page 73.

⁹ Id.

¹⁰ Id. at 73-74.

¹¹ Id. at 80-81.

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of the ownership of the property. The property continues to be the separate property of Appellant.¹² The residential property where the crime allegedly occurred was Appellant's sole and separate property. He had every right to threaten to use physical force or to use physical force against Kelly Musselmann under circumstances where a reasonable person would believe that a threat of force or use of force was necessary to terminate a criminal trespass or an attempted criminal trespass. The trial court erred in failing to apply A.R.S. Section 13-407.

IT IS THEREFORE ORDERED reversing the conviction and sentence of the Scottsdale City Court.

IT IS FURTHER ORDERED remanding this matter back to the Scottsdale City Court for entry of a judgment of acquittal for the charge of assault and the refund of any bond or fines paid by Appellant.

¹² See A.R.S. Section 25-213.
Docket Code 512